APPENDIX I

REGULATIONS, AS AMENDED, TITLE 29, CHAPTER V—CODE OF FEDERAL REGULATIONS

PART 541

SECTION 541.1.—EXECUTIVE.

The term "employee employed in a bona fide executive * * * capacity" in section 13 (a) (1) of the Act shall mean any employee—

(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

(B) who customarily and regularly directs the work of other employees therein, and

(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

(D) who customarily and regularly exercises discretionary powers, and

(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and

(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed twenty percent of the number of hours worked in the workweek by the nonexempt em-

ployees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.

APPENDIX II

UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

WASHINGTON, D. C.

"EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL * * * OUTSIDE SALESMAN" REDEFINED

Effective October 24, 1940

REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION

Pages 13, 14, and 15

"WORK OF THE SAME NATURE AS THAT PERFORMED BY NONEXEMPT EMPLOYEES"

Much of the criticism of section 541.1 was directed at the phrase "who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer." This criticism was twofold in nature. In the first place, the clause was strenuously objected to by those who found it vague and ambiguous and who felt that it has led to conflicting results in the actual administration and enforcement of the act. It was also objected to by another group of employer representatives who felt that however clarified, it would operate to disqualify a group of employees whom they wished to exempt.

The first point to be considered is the alleged ambiguity of the phrase "who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer." It is undoubtedly true that this phrase has proved difficult of administration. Many proposals were received, not unnaturally, to drop the phrase entirely, but upon closer scrutiny, the proponents usually admitted that deletion of the phrase would not solve the problem. It was freely admitted that an employee who is an executive 1 hour a week should not qualify for the exemption. The deletion of this phrase would then throw the same problem of interpretation on the words "primary duty," found earlier in the definition. "Primary duty" would then become subject to the same controversy that has already arisen over "substantial amount of work."

FIXED PERCENTAGE SUGGESTED

As an alternative to deletion, it was suggested that the phrase be defined in terms of fixed percentage. There is little doubt that any percentage that might be taken as an arithmetical equivalent of the word "substantial" must be somewhat arbitrary in nature and will cause some hardship. It will exclude certain employees from the exemption who probably might well be permitted exemption. On the other hand, it will permit the exemption of certain employees who probably should be entitled to the benefits of the Act. Nevertheless, even if full weight is given to the difficulties that inhere in the choice of a quantitive measurement, this remains the most practical solution of a difficult problem.

* * * There are, of course, any number of ways in which the word "substantial" might be translated into numerical terms. A number of employers and employer representatives suggested that "substantial" should be considered over 50 percent. However, a number of employers agreed that this was an unduly large allowance for a person who is considered as employed in a "bona fide executive capacity." Among other proposals was one that "substantial" should be interpreted to mean not more than 20 percent. The recognition of the fairness of this by quite a few employer groups would seem to be an adequate assurance that it will not work hardship on employers. * * *

BASED ON HOURS WORKED BY NONEXEMPT EMPLOYEES

In the proposals for adopting a percentage criterion there was usually no indication as to the base upon which the percentage should be taken. When this defect was pointed out the proponents agreed that it was proper to use as a base the standard workweek of the employees under the direction of the executive in question. If the base were the workweek of the employee himself, he could obtain exemption merely by increasing his hours of exempt work. In such instances the rate per hour paid the exempt employee would frequently fall below the hourly rate paid the nonexempt employees. Such a rule would encourage excessive hours of work. As a matter of administrative convenience, it will be proper in all normal situations, where the hours of work approximate 40, to take as a base for computa-

tion the 40-hour week that is established as the permanent standard under the act and consider 8 hours per workweek as the maximum allowance of nonexempt work. Unusual situations can be handled by the strict arithmetical application of the 20 percent rule; thus where the nonexempt employees work, for example, 30 or 50 hours, the allowance would be 6 and 10 hours respectively.

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